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State v. Lankford Appellant's Reply Brief Dckt. 35617

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MARK HENRY LANKFORD, Defendant-Appellant.	)	NO. 35617 Idaho County No. CR 1983-20158

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

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STATEMENT OF THE CASE

Nature of the Case

This is a first degree murder case; its outcome will determine whether Mark Lankford will serve the harshest non-capital sentence a person can serve: a life sentence without the possibility of parole. Mark[1] is challenging his judgment of conviction and sentence, as well as the district court's orders denying his requests for a new trial.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were explained in Mark's Appellant's Brief and are incorporated here by reference. However, Mark does want to correct the State's misrepresentation of facts in its Statement of Facts and Course of Proceedings. After summarizing Mark's testimony, the State claims Mark's attorney, in closing argument, "conceded 'A lot of what [Lankford] said doesn't make sense to me.'" (Resp't Br. 8 (quoting Tr., p.1859).) The State represents this statement reflects Mark's attorney did not believe Mark's testimony or think it made sense. That is false. The State took a snippet of counsel's argument and placed it completely out of context. The full quote from closing argument puts the statement in context, which gives it a meaning opposite of that assigned by the State.

> What Mark has told you has never changed in 25 years. A lot of what he said doesn't make sense to me having been raised in Montana and Idaho. I've never covered up my car in my life. I've never covered up my fire place. I don't put limbs over my fire place. When I leave I might throw some water on it or old coffee or something. Why would you do that? When I first became Mark's attorney the first thing I asked him, what did you cover your car up for? Why did you walk down the road and not take

[1]Mark Lankford is referenced herein by his first name, rather than Mr. Lankford, to distinguish him from his brothers, Bryan and Lee John, who will also be referenced by their first names. For consistency, Lane Thomas will be referenced herein by his first name.

> your car? That is the stupidest thing I ever heard of. Well, it was my pride and joy. I had everything I had in it. I didn't want anybody to have that car. I didn't want anybody to steal it. You don't know what it's like in Texas. You leave your car out there somebody is going to take your stuff. **It made sense**, especially after Mr. Urban Valentine testified that Texas is mostly private ground and the reason he went out on the Trinity River was because the person who was renting that farm ground or that bottomland was wanting those people trespassed. And when you grow up in Idaho where 90 percent of the property in this state is public ground, you don't even think about those things. You just go up into the forest and camp.

(Tr., p.1859, L.15 – p.1860, L.13 (emphasis added).) The only concession defense counsel made in closing argument was that growing up in Idaho and Montana, he was ignorant of why Mark did things the way he did, but once Mark explained why, "It made sense...."

Mark also objects to the State's repeated failure to cite to specific lines of the transcripts it relies upon in its briefing. Idaho Appellate Rule 35(e) requires citation to the reporter's transcript, including the transcript page and line number; this requirement applies not only to attorneys, but to *pro se* litigants on appeal. (Idaho *Pro Se* Appellate Handbook, *How should I format my citations?,* PDF pp.15-16, http://www.isc.idaho.gov/files/IdahoAppellateInformationHandbook_2013.pdf, last viewed October 2, 2015.) Mark Lankford has complied with the appellate rules and provided this Court with citation to portions of transcripts he relies upon to support his claims, including relevant page and line numbers. In contrast, the State places the onus on Mark and this Court to divine which portions of cited transcript pages it relies upon to support its arguments. The State's consistent failure to cite to transcript line numbers and follow basic citation rules that govern even *pro se* litigants, cannot be condoned. Mark urges this Court to disregard the State's citation to transcripts which fail to include line numbers.

ISSUES[2]

I. THE DISTRICT COURT ERRED BY PROVIDING MARK'S JURY WITH IMPROPER AND AMBIGUOUS INSTRUCTIONS WHICH RELIEVED THE STATE OF ITS BURDEN OF PROOF AND DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER THE UNITED STATES AND IDAHO CONSTITUTIONS

II. THE DISTRICT COURT'S INSTRUCTION TELLING JURORS OF MARK'S PRIOR CHARGES, CONVICTIONS AND APPELLATE PROCEEDINGS FOR THE SAME OFFENSES IN THIS CASE VIOLATED MARK'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MARK'S MOTION FOR A NEW TRIAL BASED ON THE COURT'S VIOLATIONS OF IDAHO CODE SECTION 19-2405

IV. THE PROSECUTOR'S REPEATED REFERENCES TO AND ELICITATION OF TESTIMONY REGARDING MARK'S PRIOR BAD ACTS, PRIOR CONVICTION, DEATH SENTENCE AND CONFINEMENT ON DEATH ROW THROUGHOUT THE TRIAL, REPEATEDLY CALLING MARK A LIAR AND BOLSTERING TESTIMONY OF STATE WITNESSES IN CLOSING ARGUMENT, AND HIS SUPPRESSION OF EVIDENCE REGARDING DEALS HE MADE FOR SNITCH TESTIMONY, CONSTITUTE MISCONDUCT ENTITLING MARK TO A NEW TRIAL

V. THE DISTRICT COURT ERRED IN DENYING MARK'S MOTION TO CORRECT AN ILLEGAL SENTENCE, OR A SENTENCE IMPOSED IN AN ILLEGAL MANNER, BASED ON UNTIMELINESS

[2]Mark responds only to those issues which demand a response in light of the Respondent's Brief, but otherwise relies upon his prior briefing, which he incorporates here by reference.

ARGUMENT

I.
The District Court Erred By Providing Mark's Jury With Improper And Ambiguous Instructions Which Relieved The State Of Its Burden Of Proof And Deprived Him Of His Constitutional Right To A Fair Trial Under The United States And Idaho Constitutions

The district court's verbal and written instructions to Mark's jury, considered as a whole, gave conflicting explanations of the elements of first degree felony murder the State had to prove beyond a reasonable doubt. Although Mark did not object to the problematic instructions, contrary to the State's claim (Resp't Br., pp.17-18), he did not ask for them either. Because the error was not invited, fundamental error review is proper. Mark must show the instructional defects are of constitutional dimension, they are plain from the record, and the instructions prejudiced him or misled the jury. Instructions like these which relieve the State of its burden of proof and allow it to gain a conviction without proving every element of an offense beyond a reasonable doubt, meet the fundamental error standard because they violate due process and deprive a defendant of a fair trial. *Neder v. United States,* 527 U.S. 1, 12 (1999); *State v. Adamcik,* 152 Idaho 445, 472-73 (2012).

Jurors were instructed that Mark was charged by information with two counts of first degree felony murder in which the State alleged he **and/or** his brother, Bryan, unlawfully and with malice aforethought killed Robert and Cheryl Bravence by beating them with an unknown object in the perpetration of a robbery. (JI 2, JI 4.) Jurors were twice instructed that for both counts of first degree murder, Mark could be found guilty beyond a reasonable doubt if the State proved he was **either** "a principal to or aided and abetted in the commission of a robbery [d]uring which an unlawful killing of Robert [and Cheryl] Bravence occurred." (JI 4, JI 11.) The court explained to jurors that legally, there

is no difference between someone "who directly participates in the acts constituting a crime and a person who, either before or during its commission, intentionally aids, assists, facilitates, promotes, encourages, counsel, solicits, invites, helps or hires another to commit a crime with intent to promote or assist in its commission." (JI 18.) The court further explained the law considers anyone who "participates in a crime either before or during its commission, by intentionally aiding, abetting, advising, hiring, counseling, procuring another to commit the crime with intent to promote or assist in its commission are guilty of the crime" to be a principal to the crime. (JI 19.)

Both below and on appeal, the State argues because the Bravences' deaths occurred during the "stream of events" constituting the robbery, Mark is guilty. Specifically, the State argues "[b]ased upon the testimony presented, it is certainly probable that, while the Bravences were mortally wounded at the campsite, they did not die until after their bodies were concealed."[3] (Resp't Br., p.21.) The State thus argues Mark is responsible for the Bravences' deaths under the felony murder rule even if Bryan alone robbed the Bravences and killed them, or if Bryan mortally injured but did not kill the Bravences at the campsite, because he helped Bryan load their bodies in the van and conceal them. (*Id.* pp.21-22.) The State's argument reveals why the instructions, considered as a whole, were ambiguous and may have been applied by the jury in a way that relieved the State of its burden of proof.

[3]The prosecutor suggested that even if the victims were dead when Mark took their property, he was guilty of robbery and felony murder. (Tr., p.1868, L.16 – p.1869, L.6.)

Multiple theories regarding the robbery and homicides were presented to Mark's jury.[4] Under one of the State's theories, Bryan and Mark formed the intent to steal the Bravences' van prior to the homicides, rendering them both liable for the homicides, regardless of who inflicted the fatal blows. Under the State's other theory, Bryan intended to steal the Bravences' van when he inflicted mortal or fatal injuries upon the couple; after Bryan took their van and belongings, Mark helped Bryan conceal their bodies and later benefited from the proceeds of the robbery. Under the defense theory, Bryan alone intended to steal the Bravences' van before he killed them, and after he completed the murders, Mark helped him conceal the bodies and benefitted from the robbery proceeds.

Under the State's first theory, Mark would clearly be guilty of first degree felony murder because he had the intent to commit the robbery before the Bravences' were killed. However, under the State's second theory, and under the defense theory, Mark could not be guilty of first degree felony murder because he had no intent to rob the Bravences before they were killed by Bryan. Nevertheless, the prosecutor and judge told jurors that the crime of robbery could be committed against a deceased victim. (Tr., p.1868, L.16 – p.1869, L.6.) Because the court's oral and written jury instructions were ambiguous and conflicting when considered as a whole, particularly when coupled with the prosecutor's arguments in closing, the jury may have found Mark guilty of first

[4]In the Appellant's Brief, undersigned counsel stated **two** different theories were presented to the jury regarding the robbery and homicide. (Appellant's Br., p.29.) Insofar as this assertion limits the theories presented below to two options, it is inaccurate. There were two theories presented to the jury by the State, and one presented by the defense.

degree felony murder even though the State did not prove him guilty of every element of first degree felony (robbery) murder beyond a reasonable doubt.

Specifically, the State's argument to the jury below, and to this Court on appeal, is that if Mark benefited from the robbery after Bryan killed the Bravences, or if he helped Bryan hide their bodies after Bryan took their van and belongings against their will, before or after they breathed their last breaths, he is guilty of first degree felony murder. The State's arguments are legally incorrect. Mark was charged with first degree murder during the perpetration of a robbery. If Mark did not specifically intend to commit the robbery **before** it occurred, or before the Bravences were killed, he is not guilty of felony murder. *See State v. Pina,* 149 Idaho 140, 144 (2010); *State v. Cheatham,* 134 Idaho 565, 571 (2000). "Where the intent to commit the felony does not arise until after the homicide has occurred, the rationale behind the rule no longer applies." *Cheatham,* 134 Idaho at 571. As this Court observed in *Cheatham,* when the offense alleged is felony murder involving robbery,

> a taking is still robbery regardless of when the intent to formed, as long as the defendant's force *motivated the victim's surrender of her property.* When the force applied causes death, it is difficult to see how force could have motivated the victim to surrender the property, since the victim is dead.

Id. at 570 (emphasis in original). Similarly, where the force used against the Bravences' to take their property against their will was inflicted only by Bryan, even if Mark helped moved their unconscious or lifeless bodies, Mark's actions could not have motivated the Bravences to surrender property Bryan had already taken by force.

Mark's jury should have been clearly instructed that in light of the different theories presented by the parties, the threshold question it had to decide was whether the

State had proven beyond a reasonable doubt that Mark—not Mark and Bryan, and not Bryan—intended to take the personal property of the Bravences from their person or immediate possession, against their will, by the intentional use or force of fear, prior to their deaths. The jury should have been instructed that if they did not find Mark specifically intended to take the Bravences' property from their person or immediate possession while they were alive, and against their will, by the intentional use of force or fear, either acting with Bryan or acting alone, they had to find Mark not guilty. While Mark's jury was provided with an instruction advising them they had to find Mark intended to rob the Bravences prior to their deaths (JI 12), when coupled with the aiding and abetting in the felony murder elements instruction (JI 11), the separate aiding and abetting instructions (JI 18-19), the prosecutor's arguments, and the judge's oral instructions, the jury could have found Bryan intended to rob the Bravences prior to their deaths, and because Mark later helped move their bodies and benefitted from the robbery proceeds, he was guilty as an aider and abettor. That is not the law, but the instructions, taken as a whole, allowed Mark's jury to reach such a conclusion.

Moreover, when defense counsel tried to argue this point in closing argument, the prosecutor objected and the district court intervened. In closing argument, defense counsel was reading the robbery elements instruction (JI 13) to the jury and explaining why the State could not meet their burden of proof. Counsel restated the instruction and when he got to the allegation that Mark took the Bravences' property from their person or immediate presence, and against their will, he stated, "**And this is the reason you can't rob a dead person**---." (Tr., p.1868, L.16 - p.1869, L.6 (emphasis added).) The prosecutor objected: "Your Honor, I object. I don't think that is a correct statement of the

law." The district court, in the jury's presence, agreed with the prosecutor: "I don't either. Well, Ladies and Gentlemen, I've instructed on the law, so go to my instructions and refer to that." (*Id.*) The court's instruction was a clear statement to jurors that, as a matter of law, you **can** rob a dead person. As a result, even if Mark did not do anything but take property from the Bravences after Bryan killed or mortally wounded them, Mark's own testimony would be sufficient for the jury to find him guilty of robbery and thus felony murder. Jurors were explicitly and repeatedly told the judge would instruct them on the law applicable to this case, and they had to consider the evidence in light of the judge's instructions on the law, regardless of their own beliefs. (JI 1, JI 3, JI 5, JI 10, JI 24, JI 25, JI 27.)

For these reasons, the verbal and written jury instructions, taken as a whole, were ambiguous, conflicting and erroneous. The collective instructions allowed the jury to find Mark guilty of first degree murder even though the State did not have to prove every element of the crime beyond a reasonable doubt, thereby violating Mark's due process rights and depriving him of a fair trial. *Neder v. United States,* 527 U.S. 1, 12 (1999); *State v. Adamcik,* 152 Idaho 445, 472-73 (2012). Accordingly, Mark's conviction must be vacated and his case remanded for a new trial.

II.
The District Court's Instruction Telling Jurors Mark Was Previously Charged And Convicted For These Offenses, Which Were The Subject Of A Prior Appeal, Violated Mark's Constitutional Right To A Fair Trial Before An Impartial Jury

The district court's instruction telling jurors about Mark's prior charges, convictions and appeals in this case violated Mark's constitutional right to a fair trial before an impartial jury. Although Mark did not specifically object to the instruction, contrary to the State's claim (Resp't Br., p.23), he did not acquiesce to it either. Because

counsel did not object to the district court advising jurors of Mark's prior trial, conviction and appellate proceedings, the error is subject to fundamental error review. *State v. Draper,* 151 Idaho 576, 588 (2011); *State v. Perry,* 150 Idaho 209, 228 (2010).

By framing the issue as jurors' knowledge of Mark's prior trial, rather than jurors' knowledge of Mark's prior trial and prior guilt verdict, the State claims Mark has failed to cite any cases where a court found a constitutional violation that required reversal of a conviction. To the contrary, other courts have recognized jurors' knowledge that the defendant was previously found guilty of the same offense for which he is now on trial is so prejudicial as to constitute a denial of a defendant's constitutional right to a fair trial. *See, e.g., Hughes v. State*, 490 A.2d 1034, 1044-46 (Del. 1985) (holding jurors' knowledge of defendant's prior trial and conviction for same offense, which was discussed among jurors prior to deliberations, raised a presumption of jury bias that violated the defendant's right to a fair and impartial jury); *State v. Lee*, 346 So. 2d 682, 683-85 (La. 1977) ("When a jury is informed by the state that the accused was convicted of the crime on a previous occasion, the defendant's right to a fair trial, protected by both the federal and state constitutions, has been violated.").[5] *See also, e.g., Fullwood v. Lee*, 290 F.3d 663, 682-83 (4th Cir. 2002) (recognizing, in dicta, that a violation of the defendant's Sixth Amendment right to an impartial jury trial may occur if the jury learned the defendant had previously been found guilty of murder and sentenced to death). *But cf. State v. Dunlap,* 155 Idaho 345, 366 (2013) (holding sentencing jurors' knowledge that district court previously imposed death sentence in same case was not error).

[5]*Compare State v. Williams*, 445 So. 2d 1171, 1177 (La. 1984) (holding prosecutor's remarks and elicitation of testimony referencing defendant's prior trial, but not his prior conviction, was not sufficiently prejudicial to warrant a new trial).

Other courts that have dealt with this issue, although not asked to decide on constitutional grounds, have almost universally agreed that while a fleeting reference to a prior trial is a relatively minor error that can be cured with an instruction, a reference to the outcome of a former trial is so extraordinarily prejudicial that it will typically require a new trial. *See, e.g., Arthur v. Bordenkircher*, 715 F.2d 118, 118-20 (4th Cir. 1983) ("[W]e are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." (internal quotes omitted)); *United States v. Attell*, 655 F.2d 703, 704-05 (5th Cir. 1981) (holding pretrial publicity which reported the defendant had previously been convicted of the charged offense required reversal of the defendant's conviction); *Frazier v. State*, 632 So. 2d 1002, 1007 (Ala. Ct. App. 1993) ("The appellant asserts that the prosecutor committed reversible error when he referred to the appellant's previous conviction for the offense for which he was being tried. We must agree.")[6]; *Williams v. State*, 629 P.2d 54, 58-60 (Alaska 1981) (holding trial court erred in denying the defense's motion for a mistrial following prosecutor's statement that defendant's prior jury trial for the same offense was hung 11 to 1); *Bailey v. State*, 521 A.2d 1069, 1076-77 (Del. 1987) ("The jury not only learned that the defendant had been previously tried for the same charge, but that the 1980 trial had ended in a conviction. That information, regardless of how it is received, is inherently prejudicial and even more so when a jury is exposed to those facts during trial."); *Duque v. State*, 498 So. 2d 1334, 1337 (Fla. Dist. Ct. App. 1986) (holding where newspaper article published during the defendant's trial reported the defendant had been

[6]*Compare Sneed v. State*, 1 So. 3d 104, 114-15 (Ala. Ct. App. 2007) (holding where "none of the references to a first trial or to prior proceedings specifically informed the

convicted at her first trial, the trial court's refusal to grant defense counsel's motion to question jurors about the article was reversible error)[7]; *Hood v. State*, 537 S.E.2d 788, 790 (Ga. Ct. App.2000) (holding where prosecutor brought up the defendant's prior trial but not the prior guilty verdict, the trial court's curative instructions on the matter were sufficient); *People v. Jones*, 528 N.E.2d 648, 658 (Ill. 1988) (holding where witness's testimony that she had seen particular evidence at "the last trial," did not reveal outcome of the prior trial and jurors were advised by the court to disregard her testimony, the brief remark did not prejudice the defendant or impair his right to a fair trial)[8]; *Major v. Commonwealth*, 275 S.W.3d 706, 716-17 (Ky. 2009) (holding witness's testimony referring briefly to prior trial, but not the outcome, when coupled with the trial court's admonition to disregard the testimony, was not prejudicial and did not warrant a mistrial); *Coffey v. State*, 642 A.2d 276, 281-85 (Md. Ct. App. 1994) (holding experienced police officers' repeated testimony that the defendant had previously been tried and convicted of the same charges, where curative instruction served to emphasize the inadmissible testimony, required mistrial because it deprived the defendant of a fair trial). *Cf. State v. Watkins,* 152 Idaho 764, 766-67 (Ct. App. 2012) (holding police officer's reference to prior trial and appeal in testimony did not warrant mistrial where officer did not testify

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jury that the appellant had previously been convicted of capital murder and sentenced to death," the references were not plain error).

[7]*See also Weber v. State*, 501 So. 2d 1379, 1381-85 (Fla. Dist. Ct. App. 1987) ("Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assurances that they have not been affected by the information can overcome it.").

[8]*Cf. McDonnell v. McPartlin*, 736 N.E.2d 1074, 1091 (Ill. 2000) (holding brief, non-fact specific reference by witness to billing done "through the trial of last year," was not prejudicial).

defendant was convicted, court gave curative instruction and evidence of guilt was overwhelming).

When Mark's motion to exclude references to the prior trial was discussed at pretrial hearings, the district court asked the prosecutor "You do agree that prior conviction, prior charges, prior incarceration, are not admissible?" the prosecutor responded, "I do, Your Honor." (11/21/07 Tr., p.36, Ls.19-21.) The district court affirmed, "Yeah, I do, too. I think that's a given." (*Id.*, p.36, Ls.22-23.) During those same discussions about how to handle witness testimony from the prior trial, defense counsel suggested "the proper thing to do in that regard would be to state that at – just state, during your previous testimony did you state the following. Rather than saying, during the first trial in this case did you state the following." (*Id.*, p.102, Ls.3-7.) The district court agreed, acknowledging, "Mr. Lankford comes in with a presumption of innocence, and if the jury knows there's already been a conviction that presumption has a tough time having any air left." (*Id.*, p.102, Ls.13-16.) Nevertheless, the district court instructed jurors that Mark had been tried for the same crimes, but that an appellate court reversed his conviction because he was not effectively represented. (1/28/08 Voir Dire Tr., p.115, Ls.6-18.)

Contrary to the State's repeated assertions (Resp't Br., p.28), there is nothing in the record showing Mark "acquiesced to the district court's advisement and instruction." (*Id.*) As this Court has long recognized, "[t]he district court, a court of record speaks through its record." *Ebersole v. State,* 91 Idaho 630, 634 (1967). "The acts of a court of record are known by its records alone and cannot be established by parol testimony, the court speaks only though its records, and the judge speaks only through the court." *Id.*

(quoting with approval *Herren v. People,* 363 P.2d 1044, 1046 (Colo. 1961) *(en banc)*). Despite this, the State asks this Court to **assume** that despite Mark's written objection, the parties reached a contrary agreement to instruct jurors about his prior conviction and related proceedings. This Court has refused to presume fundamental error stemming from alleged prosecutorial misconduct, when the only proof is a silent record, *State v. Wright*, 97 Idaho 229, 233 (1975); this Court should similarly refuse to presume Mark agreed to tell jurors about his prior trial, conviction and related proceedings, not just from a silent record, but a contrary record.

The State agrees Mark's jury was instructed he was tried in 1984 for the same crimes, but that an appeals court had decided Mark was not effectively represented in that trial, rendering the trial unfair. (Resp't Br., pp.30-32.) The record also clearly reflects the prosecutor elicited testimony during the state's case-in-chief that Mark had been on death row for twenty-three years for two murders in Grangeville, he was friends with guards at the prison, and he and Bryan were on death row together for many years. (Tr., p.1248, L.21 – p.1249, L.3, p.1276, Ls.9-11, p.1325, Ls.1-6, p.1323, Ls.2-10, p.1328, Ls.18-23, p.1328, L.24 – p.1329, L.24.)

Based on these facts, the State argues that while jurors knew of the prior trial and appeal in this case, jurors were not told and did not know Mark had been found guilty at the prior trial. (Resp't Br., p.30 ("The jury in Lankford's case was not so instructed, but merely advised there was a prior trial and an appellate court held his trial was unfair; there was no statement that he was previously found guilty.").) The State's argument is premised on the belief that Mark's jury was too ignorant to draw a basic and reasonable

inference from the facts. The only reasonable inference to be drawn from these facts is that Mark was found guilty of the Bravences' murders.

Assuming the State's argument has merit, testimony that Mark was on death row for decades is even more prejudicial because the jury had to assume Mark was on death row for killing someone other than the Bravences. Where a "jury not only learns that a defendant has been previously tried for the same charge, but that the [prior] trial had ended in a conviction, [t]hat information, regardless of how it is received, is inherently prejudicial and even more so when a jury is exposed to those facts during trial." *Bailey v. State*, 521 A.2d at 1076-77. Here, jurors' knowledge of Mark's prior trial and conviction for the same offenses was inherently prejudicial, depriving Mark of his presumption of innocence and his constitutional right to fair trial before an impartial jury.

The State next claims Mark's trial counsel made a strategic choice to tell jurors about his prior trial and convictions for the same crimes, as well his time on death row, so the errors Mark complains of now do not "plainly exist," thereby failing to meet the second prong of the fundamental error standard. First, there is no evidence such a choice was ever made; though the record is pregnant with counsel's expressions of concern and indecision on this point, indecision is neither a choice nor a decision. Moreover, even assuming *arguendo* counsel decided to tell jurors about Mark's prior trial, prior convictions and death sentences for the same offenses, it was objectively unreasonable. Strategic choices "are owed deference commensurate with the reasonableness of the professional judgments on which they are based." *Strickland v. Washington*, 466 U.S. 668, 681 (1984). A cursory review of the case law reveals near universal condemnation of telling jurors about a defendant's prior trial and conviction for the same offenses; these

cases emphasize the inherent prejudice that results from sharing this information with jurors. Even if counsel decided to share this inherently prejudicial information with Mark's jury, the decision was objectively unreasonable.

Finally, as the cases above reveal, telling jurors the defendant has been previously tried and convicted of the same charges is inherently prejudicial, affecting the base structure of the constitutional right to a fair trial before an impartial jury, consistent with structural error. *See State v. Perry,* 150 Idaho 209, 227-28 (2010) ("Where the error in question is a constitutional violation found to constitute a structural defect, affecting the base structure of the trial to the point that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, the appellate court shall automatically vacate and remand."). The United States Supreme has defined structural error as a

> structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (internal quotations and citations omitted).

Even if not deemed structural, the error in advising jurors of Mark's prior trial, conviction death sentence, and appeal for the same offenses, affected Mark's substantial rights and affected the outcome of his trial. To find Mark guilty, the jury had to credit the testimony of either Bryan or Lane Thomas, or both. What these witnesses lack in credibility, they make up for in their willingness to testify falsely when the price is right. Under the facts of the case, where the physical evidence could support convictions of

either Bryan or Mark acting alone,[9] or both acting together, disclosing Mark's prior trial, conviction, sentence and appeal in this same case, undoubtedly affected the outcome of his trial. Under these circumstances, Mark's convictions must be vacated and his case remanded for a new trial before a fair and impartial jury.

III.
The District Court Abused Its Discretion In Denying Mark's Motion For A New Trial Based On The Court's Violations Of Idaho Code Section 19-2405, Idaho's New Trial Statute

Mark maintains the district court abused its discretion by allowing prior testimony to be read into the record, rather than requiring the State to produce the testimony anew, and by telling jurors about his prior trial, conviction, sentence and appeals, all of which were contrary to the plain language of Idaho's new trial statute. *See* I.C. § 19-2405. Mark incorporates his prior arguments here by reference. (*See* Appellant's Br., pp.35-45.)

Idaho's new trial statute was adopted in 1864 and it unambiguously provides that "[t]he granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be **produced anew**, and the former verdict can not be used or referred to either in evidence or in argument." I.C. § 19-2405 (emphasis added). While there is no specific evidence Idaho's new trial statute was borrowed from California, this

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[9]As the Ninth Circuit Court of Appeals concluded when it granted Mark relief, whether Mark or Bryan, individually or collectively, killed the Bravences is not decided by the physical evidence.

> Although there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences, *only* Bryan's testimony singled out Mark as the killer. There were no witnesses to the murder, and no murder weapon was admitted into evidence. There was no forensic or circumstantial evidence suggesting that Mark, rather than Bryan, beat the victims to death.

Lankford v. Arave, 468 F.3d 578, 586-87 (9th Cir. 2006).

Court has acknowledged much of Idaho's territorial law was.[10] *State v. Lundhigh,* 30 Idaho 365, 164 P. 690, 691 (1917), *overruled on other grounds by State v. McMahan,* 57 Idaho 240, 65 P.2d 156, 160 (1937). Generally, when the Idaho Legislature borrows another state's statute, this Court presumes it knew of the other state's existing interpretations, and intended Idaho's interpretations to be the same. *Doggett v. Electronics Corp. of Am., Combustion Control Div.*, 93 Idaho 26, 29 (1969); *State v. Taylor,* 59 Idaho 724, 87 P.2d 454, 457 (1939) ("This court, in conformity with the general rule, has held that a statute adopted from another state is usually, though not conclusively, construed in accordance with the decisions of the courts of that state rendered prior to its adoption herein if their interpretation is reasonable." (citations omitted)).

The presumption of parity of interpretation does not apply when the borrowed statute has yet to be interpreted by the lending state's highest court. As this Court recognized in *Lundhigh*, the California Supreme Court's interpretation of a statute **after** Idaho adopted the statute "might be persuasive, but would not be binding upon this court." 164 P. at 691 (citation omitted). Nine years after Idaho adopted its new trial statute, the California Supreme Court interpreted its own new trial statute for the first time and concluded that "[t]o prove what a witness swore to on a former trial *is* producing the testimony anew, and is not using or referring to the former verdict in any sense." *People v. Devine,* 46 Cal. 45, 48 (1873). The California Supreme Court's

[10]Idaho originally consisted of all of Idaho, Montana, and most of Wyoming. 2015 Idaho House Concurrent Resolution No. 15, State Affairs Committee, 63rd Legislature, first regular session (recognizing Idaho's 125th anniversary of statehood and the creation of the territory of Idaho on March 4, 1863) (last accessed on September 21, 2015 at http://www.legislature.idaho.gov/ legislation/2015/HCR015.pdf).

interpretation of its own statute nearly a decade after Idaho borrowed it, is of nominal value in deciding what Idaho's new trial statute means.

Nevertheless, the State argues the California Supreme Court's interpretation of its own statute is the only proper way for this Court to interpret Idaho's statute; the State's argument ignores contrary decisions in other jurisdictions, and ignores similar statutes which allow for admission of prior testimony only because of explicit statutory language, which Idaho's statute lacks. *See, e.g., State ex. rel. Mazurek v. District Court of Twentieth Judicial Dist.,* 22 P.3d 166, 169 (Mont. 2000) (recognizing that prior statutory language requiring testimony to be produced anew would preclude use of testimony from an earlier trial in a new trial of the same case); 22 OKLA. STAT. ANN. § 951(A) (Westlaw through September 1, 2015) (explicitly providing that when a new trial is ordered, all "testimony must be produced anew except of witnesses who are absent from the state or dead, in which even the evidence of such witnesses on the former trial may be presented...."). Moreover, because Idaho adopted its new trial statute at a time when its territory included Montana and most of Wyoming, the Montana Supreme Court's interpretation of the same statutory language, as cited above, which is consistent with Mark's reading of the statute, is far more persuasive than that of the California Supreme Court.

The State then argues Mark's interpretation of section 19-2405 cannot be reconciled with section 9-206, which provides that:

> [t]he testimony of a witness who testified at the trial in an action or proceeding in any district court of the State of Idaho . . . shall be admissible at any subsequent trial between the same parties, and relating to the same subject matter, when such witness is deceased, absent from the state or otherwise unavailable or unable to testify as a witness.

I.C.§ 9-206. The State claims the conflict between the two statutes is irreconcilable, requiring this Court to disregard the 1864 new trial statute in favor of section 9-206, enacted in 1945. (Resp't Br., p.40.) The State similarly argues the new trial statute conflicts with Rule 804(b)(1) of the Idaho Rules of Evidence (IRE), and must be disregarded. (Resp't Br., pp.40-41.)

The statutes are not irreconcilable. Section 19-2405 is specific and narrow, applying only to new trials in criminal cases, not civil cases. In contrast, section 9-206 purports to apply to testimony offered in any proceeding, trial or not, civil or criminal. Because section 19-2405 is specific and section 9-206 is general, section 19-2405 controls. *See Ausman v. State,* 124 Idaho 839, 842 (1993) ("A specific statute, and by analogy a specific rule of civil or criminal procedure, controls over a more general statute when there is any conflict between the two or when the general statute is vague or ambiguous."). Much like Idaho Code section 9-206, IRE 804(b) governs the admissibility of prior testimony in any proceeding, not just trials and not just criminal cases. Thus, the specific and narrow language of section 19-2405 controls over the general, broad language of IRE 804(b)(1), which is virtually identical to Section 9-206.

The rights of an accused in a criminal case are greater than any party to a civil lawsuit, and are constitutionally guaranteed. The federal constitution sets the floor of constitutional rights, not the ceiling, and states are always free to provide greater protections to its own citizens. *See, e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980); *Cooper v. California,* 386 U.S. 58, 62 (1967). Here, the Idaho Legislature chose to provide criminal defendants with greater protections in criminal cases when a new trial is granted through section 19-2405, which protects a defendant's constitutional

right to a fair trial that is free of bias or prejudice stemming from knowledge of the prior trial, protects the presumption of innocence, protects a defendant's right to compel witnesses on his behalf and confront witnesses against him, and places the parties in the same position they would have been had the first, defective trial not taken place.

Because the new trial statute is constitutionally based, and it is specific to criminal cases, it cannot be overruled by court rule or a non-conflicting statute. *Cf. Dickerson v. United States,* 530 U.S. 428, 444 (2000) ("*Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] announced a constitutional rule that Congress may not supersede legislatively."). Although this Court has never considered the new trial provision, it should give it the deference it is entitled, having been part of our history since 1864.

IV.

The Prosecutor's Repeated References To And Elicitation Of Testimony Regarding Mark's Prior Bad Acts, Prior Conviction, Death Sentence And Confinement On Death Row Throughout The Trial, Repeatedly Calling Mark A Liar And Bolstering The State's Own Witnesses' Testimony In Closing Argument, And His Suppression Of Evidence Regarding Deals He Made For Snitch Testimony, Constitute Misconduct Entitling Mark To A New Trial

Throughout Mark's trial, the prosecutor engaged in numerous instances of misconduct, a majority of which Mark's attorneys did not object to. The prosecutor also suppressed exculpatory evidence of deals he made in exchange for snitch testimony, and elicited false testimony from the snitches at Mark's trial. These instances of misconduct deprived Mark of his constitutional right to due process and a fair trial, requiring vacation of his convictions and a remand for a new trial.

The United States Supreme Court has recognized that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219 (1982). In

addition, as this Court has long acknowledged, "[w]hile our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair." *State v. Field,* 144 Idaho 559, 571 (2007) (quoting *State v. Estes,* 111 Idaho 423, 427-28 (1986) (citations omitted)). Moreover, prosecutorial "appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Phillips,* 144 Idaho 82, 86-87 (Ct. App. 2007).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88 (1935).

Prosecutors have unchecked discretion to decide who to prosecute, when to prosecute, which crimes to prosecute, whether to make a plea offer, whether evidence is subject to disclosure under *Brady,* and whether to seek a death sentence. They have at their beck and call a standing army of investigators, process servers, and witnesses, their own crime lab, and virtually unlimited access to criminal databases, including NCIC, CODIS (DNA) and fingerprint databases. What prosecutors possess in power and

resources, they lack in oversight. When prosecutors abuse their powers and engage in misconduct, it falls to the judiciary to hold them accountable.

For reasons similar to those this Court relied upon to reject the good faith exception to the exclusionary rule in the Fourth Amendment context, this Court should protect the rights of the accused to due process and a fair trial by adopting a similar rule in cases involving prosecutorial misconduct. When this Court rejected the Supreme Court's adoption of a good-faith exception to the exclusionary rule in *United States v. Leon,* 468 U.S. 897 (1984), it did so because Idaho's exclusionary rule was based on more than just deterring police misconduct:

> We believe that the exclusionary rule should be applied in order to: 1) provide an effective remedy to persons who have been subjected to an unreasonable government search and/or seizure; 2) deter the police from acting unlawfully in obtaining evidence; 3) encourage thoroughness in the warrant issuing process; 4) avoid having the judiciary commit an additional constitutional violation by considering evidence which has been obtained through illegal means; and 5) preserve judicial integrity.

State v. Guzman, 122 Idaho 981, 993 (1992). Similar rationales compel this Court to: 1) provide an effective remedy to persons whose due process and a fair trial rights have been violated by prosecutorial misconduct; 2) deter prosecutors from acting unlawfully to obtain convictions; 3) provide incentives for prosecutors to err on the side of constitutional behavior; 4) avoid having the judiciary commit additional constitutional violations by condoning prosecutorial misconduct; and 5) preserve judicial integrity, which serves an important societal purpose.

> [W]e are cognizant of the need to insure that the judiciary does function, and is perceived as functioning, in a manner consistent with the individual constitutional rights, both state and federal, of all who appear before the bar of justice. While the primary purpose of the exclusionary rule is undoubtedly to deter police misconduct, **it is also true that at some point**

the courts must simply refuse to countenance certain behavior on the part of law enforcement agencies.

State v. LePage, 102 Idaho 387, 391 (1981) (emphasis added).

Similarly, Mark urges this Court to provide a remedy to individuals who are deprived of their constitutional rights to due process and a fair trial by prosecutorial misconduct, and provide incentives for prosecutors to err on the side of constitutional behavior, by resolving close questions involving misconduct in the defense's favor, not the State's.

A. Prosecutorial Misconduct During Trial, Eliciting Testimony Regarding The Prior Case

Mark's prosecutor elicited testimony regarding Mark's prior trial, conviction, sentence and appeals, which violated his Sixth and Fourteenth Amendment right to a fair trial, and which was in direct violation of the district court's pretrial orders. *See State v. Perry,* 150 Idaho 209, 227 (2010). The State disregards Mark's argument that the prosecutor's misconduct violated his constitutional right to a fair trial, and claims because the challenged testimony merely violated the district court's order, the misconduct, if any, is a rule violation, not fundamental error. (Resp't Br., p.48.) Mark maintains his prosecutors secured a verdict based on factors other than the law,[11] evidence properly admitted at trial,[12] and reasonable inferences that could be drawn from that evidence. *Id.;*

[11]As explained in Issue I, *supra,* the jury instructions in Mark's case permitted the jury to find him guilty of felony murder (robbery), even if he had no intent to take the Bravences' property prior to their deaths. The prosecutor exploited this defect, assuring jurors that so long as Mark received the property while in Idaho, he was guilty of felony murder.

[12]Given Bryan's inherent unreliability, included his admissions that he committed perjury on multiple occasions, the prosecutor's decision to present Bryan as a State's witness was arguably itself a violation of his duty to ensure the jury receives only competent evidence.

cf. State v. Sharp, 101 Idaho 498, 504 (1980) ("Every person accused of crime in Idaho has the right to a fair and impartial trial. The court recognizes the duty of a prosecutor to see that the accused reviewed a fair trial." (citations omitted)). In doing so, the prosecutor violated Mark's constitutional right to a fair trial.

> It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury. They should not "exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused."

State v. Christiansen, 144 Idaho 463, 469 (2007) (internal citations omitted) (emphasis added).

As this Court has noted, "As public officers, prosecutors have a duty to ensure that defendants receive fair trials." *State v. Severson,* 147 Idaho 694, 715 (2009). Thus "a prosecutor must 'guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.' A prosecutor must also ensure that the jury receives only competent evidence." *Id.* (quoting *State v. Irwin,* 9 Idaho 35, 44 (1903)). This duty cannot be shifted to defense counsel.

> Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably.

Taylor v. Kentucky, 436 U.S. 478, 489 (1978) (internal citations omitted).

The United States Supreme Court has recognized the dangers of prosecutorial misconduct involving credibility vouching and expression of opinions about an accused's guilt:

> such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985) (citation omitted).

Here, prosecutors elicited testimony in the State's case-in-chief regarding Mark's prior trial,[13] his prior crimes/bad acts,[14] his prior incarceration[15] and his prior death sentence.[16] (Tr., p.1248, L.21 – p.1249, L.3, p.1276, Ls.9-11, p.1288, Ls.22-24, p.1323,

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[13]The prosecutor solicited testimony from Bryan, which either by the questions, or the reasonable responses to the questions, produced objectionable information about Mark's prior trial. (*See, e.g.,* Tr., p.1329, Ls.6-7 ("And did you give this same story at Mark's first trial?"); Tr., p.1323, Ls.11-17 (prosecutor asking whether Bryan had testified in court and provided a different story about who was responsible for the Bravences' deaths, and whether the testimony was offered at a trial or at a hearing)). Similarly, the prosecutor asked Lane if Mark had told him what he was in for, if he had talked about the charges, and what he said about them, to which Lane replied, "He said he as in – he's been on death row for 23 years for two murders, and that was committed in Grangeville." (Tr., p.1248, L.21 – p.1249, L.3.)

[14]When the prosecutor questioned Bryan about Mark selling a camera to their brother, Robert, and asked Bryan if he got any money from the sale, Bryan responded, "I didn't know for sure that it was actually ever – money transpired. I thought maybe he might have just ultimately gave it to him for some drugs or something, because I remember there was drugs involved in it." (Tr., p.1317, Ls.7-11.) The defense objected to this statement and the court instructed jurors to disregard that "about the drugs." (Tr., p.1317, Ls.14-16.) When asked by the prosecutor what he and Mark did once they got to Sheep Creek Campground, Bryan responded, in part, "[U]ltimately I agreed to help be a watchout because he had stolen cars before and I had never stolen a car so –." (Tr., p.1288, Ls.20-23.) Finally, when asked why he left Texas, Bryan explained he was afraid of going to prison for a probation violation and "I was scared of prison because of what Mark told me about prison, where he had been." (Tr., p.1276, Ls.9-11.)

[15]When Bryan testified he changed his story about his involvement in the Bravences' deaths because he was afraid of being killed, the prosecutor asked him by who, Bryan responded, "Oh, by the gang members or friends of Mark." (Tr., p.1324, Ls.3-12.) When the prosecutor asked Bryan if he ever talked to Mark about any of the statements before he made them, Bryan responded, "Oh, yes. We were on death row together for a long time." (Tr., p.1325, Ls.1-6.)

[16]*See supra* nn.13-15.

Ls.3-10, p.1325, Ls.1-6, p.1328, Ls.18-23, p.1328, L.24 – p.1329, L.24.) The State tries to distance itself from the improper testimony, claiming because it was volunteered by its witnesses, but not specifically sought by the prosecutor, the testimony did not constitute prosecutorial misconduct.

Although the State cites to some cases outside of Idaho for support (Resp't Br., p.49), none are compelling. Two are federal district court decisions where the court was asked to decide whether state court findings of no prosecutorial misconduct were contrary to Supreme Court precedent or wholly unreasonable. *See Gonzales v. Rapelje,* 2015 WL 1534489, *9, *13 (E.D. Mich. 2015) (upholding state court's finding of no misconduct where petitioner volunteered information about the nature of his prior felony conviction during cross-examination by prosecutor, despite parties' stipulation to exclude such evidence); *Ahmed v. Gibson,* 2013 WL 5487033 (C.D. Cal. 2013) (holding where jury knew of defendant's and witness's methamphetamine use, and witness's prior convictions, witness's volunteered testimony that defendant had been in prison and had beaten her, was not prejudicial; trial court struck abuse testimony and jury acquitted defendant of attempted murder and attempted voluntary manslaughter, convicting him only of assault with a firearm).

The State also cites *United States v. Tetioukhine,* 725 F.3d 1, 10 (1st Cir. 2013),[17] arguing that the court recognized a difference between volunteered testimony and that which is directly elicited. Actually, *Tetioukhine* addressed the question of whether a defendant's false direct testimony opened the door to cross-examination about the

[17]The State erroneously cites this case as "752 F.3d 1, 10 (1st Cir. 2013)." (Resp't Br., p.49.)

circumstances under which he left his jewelry store job. *Id.* at *9-*10. The Court found it did. *Id.* at *10.

Finally, of the two state cases cited by the State, one considered the question of whether a witness's improper testimony evidenced an intent by the prosecutor to provoke a mistrial, which would have then triggered double jeopardy protections and precluded retrial. *State v. Santiago,* 928 So. 3d 480, 481 n.1 (Fla. Dist. Ct. App. 2006). The other case addressed whether the district court properly denied the defendant's motion for a mistrial based on a single statement by a police officer about the defendant's prior criminal history and incarceration. *Moore v. State,* 64 So. 3d 542, 546 (Miss. Ct. App. 2011). Counsel immediately objected and moved for a mistrial; the district court denied the motion, but instructed jurors to disregard the statement. *Id.* On appeal, the court upheld the denial of the mistrial, finding because the statement was not elicited by the prosecutor but was volunteered by the officer, there was no misconduct. *Id.* This conclusion is contrary to this Court's decision in *State v. Ellington,* 151 Idaho 53, 67 (2011).

In *Ellington,* this Court recognized that a police officer's "gratuitous and prejudicial response is imputed to the State, whether or not the State intended to elicit that response." *Id.* The State acknowledges *Ellington,* but only by footnote, arguing it does not apply because "[Lane] Thomas obviously was not a law enforcement officer." (Resp't. Br., p.49, n.8.) The State fails to address Bryan's improper testimony, or explain how it is not attributable to the State.

A prosecutor has an obligation to inform state witnesses "of any subjects improper for testimony so that the witnesses may avoid violating an order in limine."

State v. Wittsell, 66 P.3d 831, 839 (Kan. 2003); *see also State v. Riley*, 796 N.W.2d 371, 380 (Neb. 2011) (holding it was prosecutorial misconduct for the prosecutor to fail to advise its witness to refrain from mentioning a polygraph exam, and even though the witness testified about the polygraph on cross-examination by the defense, "it was the responsibility of the State to instruct [its witness] on his obligation to comply with the order in limine"). Moreover, even in the absence of such an order, a prosecutor has a duty to guard against testimony containing inadmissible evidence. *Lamb v. State,* 251 P.23d 700, 708 (Nev. 2011); *People v. Warren,* 754 P.2d 218, 224-25 (Cal. 1988). As the Kansas Supreme Court has recognized:

> Intrinsically, violations of orders in limine have a prejudicial effect because the requisite for obtaining such orders is showing that the mere offer or reference to the excluded evidence would tend to be prejudicial. The primary purpose of an order in limine, after all, is to prevent prejudice during trial.
>
> The importance of compliance with orders in limine has been underscored by our caselaw imposing a duty on prosecutors to instruct their witnesses about the existence and contents of such orders as a guard against improper testimony.

State v. Santos-Vega, 321 P.3d 1, 11 (Kan. 2014) (citations omitted). Similarly, as this Court recognized in *State v. Parker,* 157 Idaho 132, 144-45 (2014), when a prosecutor questions his own witnesses in a way which conveys inadmissible evidence to the jury, he commits misconduct. Specifically, a prosecutor commits misconduct when he attempts to skirt an order in limine through direct questioning of his own witness "by giving the jury more than enough information to easily infer the content of the [inadmissible evidence]." *Id.*

The prosecutor in Mark's case had a duty to inform both Lane and Bryan of the district court's order excluding evidence of Mark's prior trial, prior incarceration, prior

death sentence, prior bad acts, and prior appeals. In addition, the prosecutor had a duty to prevent the admission of improper testimony. It does not appear the prosecutor did either of these things.

Mark acknowledges Bryan and Lane are not and were not law enforcement officers when they testified against him. Nevertheless, both Bryan and Lane testified for the State, at the State's request, and in exchange for that testimony, they received personal benefits. Because snitches and their incentivized testimony are so integrally intertwined with prosecutors, unlike regular lay witnesses who receive nothing for their testimony, snitches are agents of the State and are more like law enforcement officers than lay witnesses.

Bryan's incentive to testify for the State and say Mark killed the Bravences, not him, was significant: a chance at freedom.[18] Lane's incentives were equally great: freedom and cold, hard cash.[19] Because of the special relationship the prosecutor had

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[18]In exchange for his testimony, Bryan got a parole hearing seven years earlier than scheduled; he got testimony from a prosecutor and a police detective at his parole hearing about his assistance and cooperation in Mark's case; a name change; an agreement that he be relocated; a cellphone to keep with him, in his cell, so he could make unrecorded, unmonitored calls to his wife, friends, and family members; a prosecutor who facilitated communications between Bryan and his wife, as well as a State's witness; and, an agreement that he would not be prosecuted for prior perjury.

[19]Lane pled guilty to felony fleeing or attempting to elude a police officer and was sentenced to serve three years, with 18 months fixed, on December 10, 2007, the district court retained jurisdiction for 180 days and set a review hearing for May 12, 2008. (Supp. R., pp.251-53.) In exchange for his "truthful" testimony against Mark, Lane received immunity from prosecution for his past false statements (7/29/13 E.H. Tr., p.72, L.18 – p.73, L.23); he was released almost three months early from prison (Supp. R., pp.262-63) and placed on probation (Supp. R., pp.264-65, 693-700); as an added bonus, he got $1,500 in cash upon his release from jail. Lane's testimony later secured him three get out of jail free passes when he violated his probation on three different occasions. (8/5/13 E.H. Tr., p.261, L.6 – p.264, L.13; Supp. R., pp.751-57 (Def's E.H. Ex.CC).) By the fourth violation, the prosecutor finally refused to help Lane evade prison. (8/15/13 Tr., p.264, Ls.14-25.)

with Bryan and Lane, and the benefits they received in exchange for their testimony against Mark, their incentivized testimony is attributable to the prosecutor under the logic of *Ellington,* whether solicited or not. If prosecutors are not accountable for their agents' improper testimony, and convictions are not vacated when prosecutors either actively elicit, or passively refuse to prevent improper testimony, prosecutors will have incentive to disregard their constitutional and ethical obligations. As Judge Alex Kozinski observed in the context of *Brady* violations, which he characterized as having reached "epidemic proportions" in recent years:

> When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we enforce and invite their repetition.

United States v. Olsen, 737 F.3d 625, 631-32 (9th Cir. 2013) (Kozinski, J., dissenting from order denying petition for rehearing *en banc*); *accord State v. Phillips,* 144 Idaho 82, 89 (Ct. App. 2007) ("Although circumstances may arise, particularly if there is a pattern of repetitious misconduct by an individual prosecutor or a particular prosecutor's office, that would call for reversal ... despite the harmlessness of the error, we need not decide that question today....").

The improper testimony offered through the State's snitches was highly prejudicial, it deprived Mark of his presumption of innocence, relieved the State of its

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Despite alleged concerns about risks to Lane's life or safety because of his testimony against Mark, there is no evidence Lane was harmed while serving out the remainder of his prison sentence. Lane completed his sentence and was discharged from IDOC custody on January 1, 2012. (*See* IDOC Offender Search, Lane Franklin Thomas, IDOC no. 87733 at https://www.idoc.idaho.gov/content/prisons/offender_search/result, last accessed September 22, 2015.) According to Prosecutor Thompson, Lane's sentence topped out in January of 2012. (7/29/13 E.H. Tr., p.71, Ls.13-25.)

burden of proving his guilt beyond a reasonable doubt, and deprived him of his right to a fair trial before an impartial jury. The testimony represents an attempt to secure a guilty verdict based on factors other than admissible evidence and the law. For these reasons, the misconduct committed by the prosecutor in Mark's case warrants a new trial.

B. Prosecutorial Misconduct In Closing Argument

Throughout closing argument, the prosecutor called Mark a liar, told jurors Mark lied when he testified under oath, and then vouched for the truthfulness of State witnesses. The State minimizes the misconduct and claims to not know the difference between misconduct where the prosecutor vouched for the credibility of his witnesses, and misconduct where the prosecutor called Mark a liar and accused him of perjury.[20] To help the State recognize the difference between these types of misconduct, Mark notes the following instances of prosecutorial misconduct involve improper vouching, while the remaining misconduct identified at pages 50-52 of his Appellant's Brief, involve the prosecutor calling Mark a liar and/or a perjurer:

- "Darrell Cox had no reason to make that up. He had no reason to lie today. He was inconvenienced, I'm sure, to come in and be a witness in this case, **but he told the truth**." (Tr., p.1816, Ls.7-10 (emphasis added).)
- "We've shown you good people that have come up and been honest." (Tr., p.1820, Ls.6-8.)
- "**Lane Thomas, basically with his life on the line, came in and testified in front of you. He had no reason to lie. He did not get a plea bargain from the State.** The only thing that we agreed to do was write a letter of

[20]The prosecutor's misconduct in closing argument, telling jurors Mark lied to them during his testimony (committed perjury), include: (1) "So he lied to you on the stand when he talked about the kind of money he had when he left Texas and when he came back from Texas." (Tr., p.1817, Ls.11-14); (2) "Mark Lankford testified in this case, and there was [sic] many lies that he told you." (Tr., p.1815, Ls.18-19); and (3) "I find it strange that these people he allegedly says gave him an alibi defense have never been found. . . . I submit that there is nobody that gave him a ride, and that that's a made-up story. That's another of his lies." (Tr., p.1835, Ls.1-16).

cooperation that if he testified I would write a letter saying he came in and told the truth. And that I would send that to the Judge on his case and to the prison facility in Cottonwood where he's serving what they call a rider program." (Tr., p.1829, Ls.1-10 (emphasis added).)

- "The overwhelming evidence is, one, the testimony of Lane Thomas that puts Mark Lankford there. **A credible person that puts him there**. Mark Lankford's confession to him." (Tr., p.1833, Ls.14-18 (emphasis added).)
- "I'd ask you to think about Lane Thomas' testimony. I think we had a person there that didn't want to be here. He said – he said he didn't want to be here. He said that his life had been threatened by Mr. Lankford and that his life had been hell since he got involved in this case. **Yet, even facing that he came in and testified for nothing, nothing except a letter. And I submit he told the truth** about Mark Lankford's confession to him, about him being there with Bryan Lankford and participating in these murders." (Tr., p.1839, Ls.9-18 (emphasis added).)

Prosecutors commit misconduct in closing argument when they make comments "so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." *State v. Sheahan,* 139 Idaho 267, 280 (2003) (quoting *State v. Cortez,* 135 Idaho 561, 565 (Ct. App. 2001)). This Court has acknowledged a prosecutor cannot express his personal belief about a witness's credibility in closing argument, unless the argument is based solely on inferences from the trial evidence. *State v. Dunlap,* 155 Idaho 345, 369 (2013). A "prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence," but "when such a comment is contemplated the prosecutor should exercise caution to avoid interjecting his personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial." *State v. Pizzuto,* 119 Idaho 742, 753 n.1 (1991), *overruled on other grounds by State v. Card,* 121 Idaho 425, 432 (1991). Prosecutors should avoid statements of opinion, including "I

think" and "I believe" altogether. *State v. Rosencrantz,* 110 Idaho 124, 131 (Ct. App. 1986).

Despite the overwhelming volume of misconduct, the State argues the prosecutors did not vouch for their own witnesses, and did not improperly call Mark a liar, but simply commented on the evidence in closing argument. (Resp't Br., pp.55-59.) And even if the prosecutor did commit misconduct, and the misconduct violated Mark's constitutional rights, the State claims Mark's attorneys could have had a strategic reason for not objecting.[21] Given the prejudicial nature of the repeated misconduct, even if Mark's attorneys could identify a strategic reason for failing to object, it would be objectively unreasonable and unworthy of this Court's deference.

Finally, the State retreats to its standard response: the evidence of Mark's guilt was overwhelming, thus rendering the misconduct harmless. The State fails to identify the overwhelming evidence of Mark's guilt upon which its argument rests because it cannot; there is no overwhelming evidence of Mark's guilt. "Where the issue of guilt is debatable or it appears from the record that the jurors could have reasonably entertained doubt as to the defendant's guilt and that misconduct of the prosecuting attorney might well have influenced the result, a conviction will be reversed." *State v. Spencer*, 74 Idaho 173, 184 (1953).

No instruction from the district court could undo the volume of misconduct in closing argument. The State asked jurors to convict Mark not because the admissible evidence of his guilt was strong—it was not—but by inflaming jurors' passions against

[21]If the State claims the strategic basis was defense counsels' reluctance to object during closing argument, it is sorely mistaken. Defense counsel repeatedly objected during the prosecutor's closing argument. (*See* Tr., p.1822, Ls.3, 7, 12, p.1831, L.17, p.1835, L.19.)

him and appealing to their emotions by characterizing him as a liar and a perjurer, while simultaneously characterizing its own witnesses, including the most unsavory and unreliable ones, as saints.

> The prosecutor and defense "have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Sheahan,* 139 Idaho at 280, 77 P.3d at 969. Despite this wide latitude, "appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Ellington,* 151 Idaho 53, 62, 253 P.3d 727, 736 (2011) (quoting *State v. Phillips,* 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007)). The Court has recognized, however, that "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone." *State v. Carson,* 151 Idaho 713, 721, 264 P.3d 54, 62 (2011). "[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." *Sheahan,* 139 Idaho at 280, 77 P.3d at 969 (alteration in original) (quoting *State v. Cortez,* 135 Idaho 561, 565, 21 P.3d 498, 502 (Ct. App. 2001)).

State v. Parker, 157 Idaho 132, 146 (2014); *see also State v. Spencer*, 74 Idaho 173, 184 (1953) ("Where the issue of guilt is debatable or it appears from the record that the jurors could have reasonably entertained doubt as to the defendant's guilt and that misconduct of the prosecuting attorney might well have influenced the result, a conviction will be reversed." (citations omitted)).

To suggest the prosecutor was simply pointing out inconsistencies between Mark's testimony and that of other witnesses, or just commenting on the strength of the defense's evidence (Resp't Br., p.59), is absurd. The prosecutor engaged in misconduct to secure a conviction in a case with nominal evidence of guilt; the prejudice resulting from that misconduct could not have remedied by instructions from the court advising jurors to disregard it.

C. Prosecutorial Misconduct In Rebuttal Closing Argument

During pretrial proceedings, the State sought information regarding Mark's alibi. Defense counsel expressed frustration about providing this information, telling the State and the district court that "one of the problems I'm having is I don't know exactly when the Bravences were killed, and if the State could tell me exactly when that happened then I might be able to say, number one." (1/10/08 Hrg. Tr., p.191, Ls.5-9.) In response, prosecutor MacGregor represented to the court and defense counsel, "And, Your Honor, we do know basically that the murders occurred around dark, around 9:15, 9:00 in the evening.... On June 21st, 1983." (*Id.*, p.192, Ls.17-21.) Prosecutor Albers also chimed in: "About 9:15, longest day of the year at approximately 9:15 just at dark, June 21st 1983." (*Id.*, p.192, Ls.24-25.) The trial court and defense counsel accepted the prosecutors at their word. (*Id.*, p.193, Ls.1-3.)

At no point during the trial, or during closing argument, did prosecutors backpedal from the time of the Bravences' deaths. Instead, prosecutor Albers waited until rebuttal closing argument, when Mark had no ability to respond, to move the Bravences' time of death from 9:00 or 9:15, to 8:30 p.m. (Tr., p.1877, Ls.1-4 ("In order for the Lankfords to get to Pendleton, ... the deaths have to occur about 8:30.").) The prosecutor then summarized Bryan's story of the evening of June 21st, and contrasted it with Mark's testimony, arguing because the Bravences died at 8:30 p.m., and Bryan's story was consistent with that timeframe but Mark's was not, Bryan was telling the truth. (Tr., p.1877, L.1 – p.1879, L.12.) Defense counsel objected: "Your Honor, I'm going to object. They asked an [sic] abili defense at 9:15 p.m. that night and they are getting up

and arguing that it was at 8:30." (Tr., p.1879, Ls.13-15.) The court overruled the objection. (Tr., p.1879, L.16.)

> It is improper to misrepresent or mischaracterize the evidence in closing argument. *Rothwell,* 154 Idaho at 133, 294 P.3d at 1145. Indeed, the prosecutor "has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Griffiths,* 101 Idaho 163, 166, 610 P.2d 522, 525 (1980) (overruled on other grounds by *State v. LePage,* 102 Idaho 387, 630 P.2d 674 (1981)). Here, the prosecutor fell short of that standard by claiming, without qualification that Branam could not "get in trouble" for his testimony at Moses' preliminary hearing. The immunity agreement is clear that Branam could be prosecuted for false testimony; claiming otherwise was a misrepresentation.

State v. Moses, 156 Idaho 855, 871 (2014). Because counsel objected to the misconduct, the State must prove, beyond a reasonable doubt, the misconduct did not contribute to the jury's verdict. *State v. Perry,* 150 Idaho 209, 227-28 (2010).

The State argues prosecutors were not bound by their pretrial representations regarding the victims' time of death, and because the new time of death could be supported by evidence elicited at trial, there was no misconduct and no due process violation. (Resp't Br., pp.62-63.) Although this Court has not specifically addressed the misconduct at issue here, it has recognized the State violates due process when it argues inconsistent theories at the core of its case against two or more defendants accused of the same crime. *State v. Payne,* 146 Idaho 548, 566 (2008) (citations omitted). Moreover, this Court has recognized the doctrine of judicial estoppel prevents parties from assuming inconsistent positions in the same case.

> If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad

> proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose.

Winmark v. Miles & Stockbridge, 674 A.2d 73, 79-80 (Md. Ct. Spec. App. 1996) (additional citation omitted)[22] (quoted with approval in *McKay v. Owens*, 130 Idaho 148, 153 (1997)). As this Court noted in *McKay,* "Judicial estoppel is meant to prevent taking inconsistent positions, whether legal or factual, at least absent newly discovered evidence or fraud." 130 Idaho at 155. Neither newly discovered evidence nor fraud justify the State's inconsistent factual positions.

The State fails to explain how the prosecutor taking inconsistent factual positions was harmless beyond a reasonable doubt. The prosecutor's rebuttal closing argument stated, as fact, that the victims were killed at 8:30 p.m., a half-hour to 45 minutes earlier than prosecutors represented to the court and defense counsel. When prosecutors represented to the defense and the trial court that the victims died at 9:00 p.m. or 9:15 p.m., it did so to obtain specific alibi information from the defense. When prosecutors changed the time of the victims' deaths in rebuttal closing argument, it did so to support Bryan's testimony, which was necessary to try to convince jurors to believe the State's case (*i.e.*, Bryan's version of events), while casting doubt on Mark's testimony. (*Compare* Tr., p.1287, L.4 – p.1306, L.10 *with* Tr., p.1594, L.19 – p.1623, L.23.) In both instances, the State had something to gain from taking inconsistent positions. Because this case is truly a matter of they said versus he said, *Lankford v. Arave,* 468 F.3d 578,

[22]The *Winmark* decision was vacated by the Maryland Court of Appeals, which found the Court of Special Appeals erroneously applied the doctrine of judicial estoppel. *See WinMark Ltd. Partnership v. Miles & Stockbridge,* 693 A.2d 824, 831 (Md. Ct. App. 1997) (holding Court of Special Appeals improperly applied judicial estoppel against the

589 (9th Cir. 2006) (observing that the corroborative evidence in Mark's case implicates the Lankfords generally, not Mark specifically, and there is no unique evidence that uniquely points to Mark, rather than Bryan, as the perpetrator), absent the State's misconduct, "honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Chapman v. California,* 386 U.S. 18, 25-26 (1967). Thus, Mark's convictions and sentence must be vacated, and his case remanded for a new trial because the State cannot prove, beyond a reasonable doubt, that the prosecutor's misconduct did not contribute to his convictions.

D. Prosecutorial Misconduct For *Brady*[23] And *Napue*[24] Violations

The prosecutors below engaged in serious misconduct which violated Mark's Fourteenth Amendment due process rights. The State gained its convictions against Mark by suppressing material, exculpatory evidence about deals it made in exchange for snitch testimony,[25] and by presenting testimony it knew to be false. On appeal, the State

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petitioners, vacating judgment and remanding the matter to the Court of Special Appeals for further consideration).

[23]*Brady v. Maryland,* 373 U.S. 83 (1963).

[24]*Napue v. Illinois,* 360 U.S. 264 (1959).

[25]The dangers associated with snitch testimony are obvious but bear repeating. As Ninth Circuit Court of Appeals' Judge Stephen Trott has explained on multiple occasions:

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air: In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward.

Honorable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses,* 47 HASTINGS LAW JOURNAL 1381, 1394 (1996); *see also* Russell Covey, *Abolishing Jailhouse Snitch Testimony,* 49 WAKE FOREST LAW REV. 1375 (2014) (arguing for a complete ban on jailhouse snitch testimony absent corroboration through recording of any alleged confession/admission by a defendant, because: (1) such

incorrectly claims that when denying Mark's motion for a new trial, the court found no such violations occurred, and further claims Mark has failed to show either a *Brady* or *Napue* violation. Mark's arguments regarding the State's *Brady* and *Napue* violations, including applicable case law, are set forth in his Appellant's Brief and incorporated here by reference. (*See* Appellant's Br., pp. 54-72.)

1. Lane's Undisclosed Deal With The State And His False Testimony[26]

When Lane testified for the State on February 8, 2008, he declared he was "pretty close" to finishing the sixth month rider program.[27] (Tr., p.1246, Ls.4-15.) This was a lie. Lane started the program on December 26, 2007; by the time he testified, he was only about six weeks into the six month program, not "pretty close" to finishing.[28] (Supp. R., pp.251-53 (Defendant's E.H. Ex.S).) Lane also testified he did not receive a plea bargain for his testimony, and the prosecutor's office "did nothing to get me here to testify." (Tr.,

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testimony is so inherently biased; (2) the temptations faced by inmates to commit perjury are overwhelming; (3) jurors are inclined to give snitch testimony more value than it is worthy of; and (4) current devices, like cross-examination and post-conviction relief, are ineffective in ferreting out unreliable informant testimony); Northwestern University School of Law, Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (Winter 2004-2005) (documenting how incentivized testimony of jailhouse witnesses who were promised leniency in their own cases, or killers with incentive to cast suspicions away from themselves, contributed to 45.9% of the 111 death row exonerations to date) (last accessed at http://www.innocenceproject.org/causes-wrongful-conviction/SnitchSystem Booklet.pdf on September 18, 2015)).

[26]Incredibly, the State tries to argue Mark's claim is limited to the State's failure to tell the defense about its agreement to help Lane get out of prison and on probation. (Resp't Br., p.66, n.9.) The State's argument is belied by Mark's Appellant's Brief. (Appellant's Br., pp.58-66.)

[27]The prosecutor asked Lane, "Okay, and you're serving six months over there?" Lane responded, "Yes, sir." The prosecutor then asked, "Are you about done with that program?" Lane responded, "Pretty close, sir." (Tr., p.1246, Ls.11-15.)

[28]That is, unless the prosecutors in Mark's case told Lane they had reached an agreement with prosecutor Thompson in Latah County to secure his release from prison upon Mark's conviction.

p.1254, Ls.16-21.) This was also a lie. Lane later admitted that in exchange for his testimony, the prosecutor's office would write a letter of cooperation to the prison telling them he had testified truthfully, and had cooperated in the investigation of Mark's case. (Tr., p.1257, Ls.4-22.) Even this was a lie by omission. The prosecutor also promised to grant Lane immunity from prosecution for his prior statements, and also promised to try to get Lane out of prison and placed on probation.[29] Lane also testified the prosecutor did not offer him anything, including the letter of cooperation, until the day before he testified. (Tr., p.1262, L.14 – p.1263, L.17.) This is also a lie. (7/29/13 E.H. Tr., p.32, L.15 – p.33, L.17, p.68, L.12 – p.69, L.4, p.70, L.6 - p.72, L.24; 8/5/13 E.H. Tr., p.240, L.22 – p.244, L.12.)

Finally, Lane was asked if, other than the promised letter of cooperation, **there was any other reason** that he was testifying against Mark. (Tr., p.1259, Ls.20-22.) Lane responded, "There's no reason but just being honest." (Tr., p.1259, L.23.) This was also a lie. The prosecutor promised that he would talk to Lane's prosecutor (in fact, he already had talked to Lane's prosecutor a month or so prior to Mark's trial) and judge, try to get Lane out of prison early and placed on probation, and grant him immunity from prosecution for his prior false statements. (8/5/13 E.H. Tr., p. 241, L.4 - p.242, L.9, p.244, L.6 - p.245, L.19, p.248, L.2 - p.249, L.5, p.249, Ls.17-19.) Moreover, upon Lane's early release from prison, Skott Mealer, the lead detective on Mark's case (*id.*, p.183, Ls.11-14), cashed a $1,500 check from Idaho County payable to him, and then

[29]Lane testified that he hoped to be placed on probation **after** the rider, not during. (Tr., p.1260, L 4 – p.1261, L.4.)

clandestinely passed the $1,500 cash to Lane[30] behind a car wash, in a manner more befitting of a drug deal[31] than legitimate State business.

Despite contrary testimony from State witnesses,[32] the district court below concluded Lane was paid $1,500 not for travel expenses, but "in the same manner that sums are paid to informants." (Supp. R., p.903.) In addition, the court concluded Lane's

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[30]The State maintains that if there was no agreement to pay Lane prior to trial, "that's not a *Brady* violation." (8/5/13 E.H.Tr., p.154, Ls.23-25, p.155, Ls.3-7.) All inducements to testify, including the wink and the nod of implied future benefits not reduced to a formal agreement, are subject to disclosure under *Brady*. *See* R. Michael Cassidy, "*Soft Words Of Hope:" Giglio, Accomplice Witnesses, And The Problem Of Implied Inducements,* 98 Nw. U. L. Rev. 1129, *passim* (Spring 2004).

[31]Detective Mealer testified he got a radio or phone call on the morning of March 3, 2008, from an unknown person (8/5/14 E.H. Tr., p.172, Ls.8-19), telling him to go to the Idaho County Courthouse to meet with County Commission Doman about a check for Lane. (*Id.*, p.168, L.10 – p.170, L.7.) Detective Mealer immediately went to the courthouse and got a check for $1,500 from Commissioner Doman. (*Id.*, p.170, L.7 – p.171, L.23.) Detective Mealer testified that when he paid informants, he typically paid them in cash. (*Id.*, p.173, Ls.2-20.) Detective Mealer testified "[s]omebody had told me to – to meet him [Lane] up on 21st by a – a car wash behind, I want to say, Rosauers. But, again, I don't – I don't recall that. But I did meet him, and it was by a car wash up on 21st Street later that day." (*Id.*, p.174, Ls.2-7.) As soon as he cashed the check, he immediately drove his county vehicle to Lewiston, where he met Lane "behind a car wash in – on 21st Street." (*Id.*, p.175, Ls.2-13, p.178, Ls.3-4.) Lane testified he was told by Detective Mealer to meet the detective behind the car wash on 21st in Lewiston after he got out of jail. (8/6/13 E.H. Tr., p.428, Ls.8-18.)

[32]Dennis Albers, the lead prosecutor against Mark and Bryan Lankford in 1983-1984, was the deputy prosecutor in Mark's 2008 trial. (7/29/13 E.H. Tr., p.7, Ls.5-21.) He testified the $1,500 was travel money for Lane to get out of town and go to Texas. (*Id.*, p.35, L.21 – p.37, L.12, p.41, Ls.4-7, p.56, L.23 – p.57, L.18.) Prosecutor Albers thought the amount was too high for travel, but "it was probably reasonable in view of the benefit that he had been to the State and to get him away from Mark Lankford." (*Id.*, p.45, Ls.1-6, 14-21.) Latah County Prosecutor Bill Thompson also testified about the $1,500. Thompson testified Lane's Latah County case was set for an early review hearing on February 29, 2009. (7/29/13 E.H.Tr., p.63, L.11 – p.65, L.1.) At that hearing, Lane was released from prison and placed on probation; it was contemplated that he would go to Texas and be on unsupervised probation. (*Id.*, p.65, Ls.6-13.) Thompson testified the $1,500 payment was discussed at the hearing, and that McGregor and Albers were going to ask their commissioners to give Lane $1500 to defray costs of relocating to Texas. (*Id.*, p.76, Ls.9 -21.)

trial testimony regarding the benefits he got for testifying against Mark was not false, but that the prosecutor did not tell the defense about its agreement to try to get Lane out of prison early. (Supp. R., pp.901-902.) Both cannot be true.

Rather than acknowledging the failures of its brethren to meet their constitutional obligations, the State defends the prosecutors' nondisclosure, and minimizes the import of the undisclosed evidence, characterizing it as cumulative impeachment and nothing more than "minute details." (Resp't Br., pp.70-71.) Additionally, the State claims Lane "was forced to endure" extensive impeachment through cross-examination, and therefore, even if he did testify falsely, the false testimony was cumulative because he was so extensively impeached. (*Id.*, p.72.) It is unclear which cross-examination the State relies on for this statement, as it cites none; given the limited cross-examination and impeachment of Lane at Mark's trial, it cannot be this case. (*See* Tr., p.1260, L.4 – p.1270, L.24.)

Lane testified the prosecutor's letter of cooperation, the State's agreement not to prosecute him for perjury for his prior statements, and because he was just being honest, were his only inducements to testify against Mark. What the jury did not hear was that Mark's prosecutors had met with Lane's prosecutor a month before Mark's trial and had already made arrangements for Lane to get released from prison, so long as his testimony inculpated Mark. The jury also did not hear that once Mark was convicted, the prosecutors were going to get Lane out of prison **three months early**, on **unsupervised** probation. Jurors also did not know that Lane got $1,500 in cash for his testimony. The reason the jury did not know this information is because the prosecutor allowed Lane's false testimony regarding the scope of the prosecutor's agreement with him to go

uncorrected, and because the prosecutor failed to tell the defense about all the benefits it promised Lane in exchange for his testimony.

The State's efforts to minimize the benefits Lane received in exchange for his testimony and the impact that information would have had on Lane's credibility before the jury, had the State disclosed it, is unavailing, The suppression of the prosecutor's deal with Lane to testify against Mark, and the prosecutor's decision to allow Lane's false testimony about that deal to go uncorrected, left the jury not only with incomplete information upon which to judge Lane's credibility and the credibility of his story about Mark's alleged confession to him, but false information about Lane's deal with the prosecutor and incentive to testify.

2. Prosecution's Undisclosed Deal With Bryan And Elicitation Of False Testimony

Bryan is a professional perjurer. By his own admissions, he lies under oath in open court, and he lies in sworn statements and affidavits filed with the courts. Bryan lies to get what he wants. His perjured testimony in Mark's trial, followed by yet another recantation, is unremarkable and should come as no surprise to anyone who knows him, or knows of him. However, Bryan's penchant for perjury may not be as obvious to jurors who have no prior involvement with him; they may have accepted his explanations for his past history of perjury and false statements. As a result, evidence of Bryan's willingness to lie, if only by omission, about benefits he received from the prosecutor for his testimony, was important evidence of Bryan's continued willingness to lie and commit perjury when it suits his needs.

At Mark's trial, Bryan testified about the deals he was getting in exchange for his testimony, which were numerous; however, he failed to mention having a cell phone in

his jail cell, and to having prosecutor MacGregor at his disposal to facilitate communications between him and his wife Francoise, and between him and his brother, Lee John.[33] The prosecutor allowed the omissions to go uncorrected, even though the prosecutor had walked Bryan through every other benefit the State had given him to testify against Mark when Bryan was struggling to remember them all. (Tr., p.1329, L.21 – p.1335, L.18.) The prosecutor stated, in his questioning of Bryan, "Do you remember if – just want to make sure we get all these conditions down – regarding what you've been offered by the Prosecutor." (Tr., p.1334, Ls.21-23.) After Bryan admitted to additional promises for his testimony, the prosecutor asked, "Is there any other reasons why you're testifying today?" (*Id.*, p.1336, Ls.4-5.) When Bryan responded, "Absolutely," the prosecutor asked "[a]ny personal reasons?" (*Id.*, p.1336, L.7.) When Bryan began to offer his inadmissible opinion, the defense objected and the objection was sustained. (*Id.*, p.1336, Ls.9-14.) The prosecutor said he was finished questioning Bryan, but never asked him about the rest of the benefits the State gave him for testifying. The State ignores the *Napue* violations resulting from the prosecutor's elicitation of incomplete testimony from Bryan about the benefits he received for his testimony, knowing that its incomplete nature rendered it false, if only by omission.

[33]The district court concluded Bryan's failure to reveal the prosecutor provided him with access to a cellphone during his testimony about benefits he was receiving in exchange for his testimony was not perjured because "Bryan was never asked about such access nor asked generally about any jail house privileges." (Supp. R., p.910.) This view toward suppressed exculpatory evidence has been disavowed by the United States Supreme Court: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). The court did not address the prosecutor's facilitation of pretrial communications between Bryan and Lee John, or communications between Bryan and his wife, Francoise.

Instead, the State focuses on the *Brady* violation stemming from prosecutors' failure to tell defense counsel that it facilitated Bryan having a cellphone while he was in jail,[34] prior to and during Mark's trial,[35] and for failing to tell defense counsel that it facilitated communications between Bryan and another State's witness, as well as his wife.[36] The State claims that this suppressed evidence was not material because the jury was already aware of Bryan's history of false statements and perjury, and even if the communications were additional consideration for his testimony, they "would have been nothing more than a feather laid upon a stack of bricks that had already repeatedly challenged every aspect of his retrial testimony." (Resp't Br., p.75.) The State's argument is essentially that Bryan's lack of credibility excused it from its constitutional obligation to disclose exculpatory evidence. That is, no matter how great the undisclosed impeachment evidence was, it was irrelevant because nothing could diminish Bryan's credibility further. This is the same conclusion the district court reached in rejecting Mark's motion for a new trial. (Supp. R., p.912.)

While the State downplays the relevance and significant of Bryan's possession of a cellphone in his jail cell for the 3-4 months prior to and during Mark's trial, it is worth noting that Idaho law now makes the unauthorized or unlawful possession of a cellphone

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[34]Detective Mealer testified prosecutor MacGregor asked him to get Bryan a cellphone while he was in the county jail. (E.H. Tr., p.188, L.11 - p.189, L.4, p.194, L.25 – p.195, L.2.)

[35]The district court concluded the State suppressed this evidence below in violation of *Brady*, (Supp. R., pp.911-12.)

[36]Lee John is Mark's and Bryan's brother. Lee John testified for the State against Mark and corroborated aspects of Bryan's testimony regarding a purple club Mark owned and which Bryan claimed Mark used to assault the Bravences. (Tr., p.1500, L.8 – p.1521, L.13.) The fact that the prosecutor facilitated communications between Bryan and Lee John prior to trial would have been devastating to Lee John's testimony, Bryan's testimony and the prosecutor's credibility before the jury.

in a jail or other correctional facility a felony punishable by up to five years in prison and a $10,000 fine.[37] I.C. § 18-2510(3)(c), (4), (5)(b), (5)(c), I.C. § 18-101A(1). The State does not bother to address Mark's claims regarding its suppression of evidence that the prosecutor facilitated pretrial communications between Bryan and Lee John, a State witness, as well as communications between Bryan and his wife, Francoise.

For the reasons explained here and in his Appellant's Brief, the *Brady* violations stemming from the State's failure to disclose the deals it made with Lane and Bryan, in exchange for their testimony against Mark, prejudiced Mark. There is a reasonable probability that, had the evidence of the deals prosecutors made in exchange for snitch testimony been disclosed to the defense, the result of the trial would have been different. The only evidence specifically identifying Mark rather than Bryan as the Bravences' killer, was the testimony of Lane and Bryan. The more evidence the defense had to discredit their testimony, including the incentives they had to testify against Mark, the less weight jurors would have given to their testimony; evidence of the undisclosed plea deals undermines confidence in the jury's verdicts. Moreover, Lane's and Bryan's false testimony about the incentives given to them by prosecutors in exchange for their testimony against Mark could have, in any reasonable likelihood, affected the judgment of the jury, or had an effect on the outcome of the trial. For these reasons, the State's *Brady* and *Napue* violations require that Mark's convictions be vacated and his case remanded for a new trial.

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[37]Section 18-2510 was enacted in 2012 and replaced other code sections which criminalized the possession of contraband in Idaho correctional facilities. The new statute "modernize[d] contraband language to include communication devices which allows persons to bypass security and engage in criminal activity inside and outside facility

V.
The District Court Erred In Denying Mark's Rule 35 Motion To Correct An Illegal Sentence, Or A Sentence Imposed In An Illegal Manner, Based On Untimeliness

The State argues the mailbox rule does not apply because Mark was still represented by counsel when his Rule 35 motion was filed. (Resp't Br., pp.76-83.) As explained in his Appellant's Brief, Mark's Rule 35 motion was filed after his notice of appeal was filed by his trial counsel, and after the SAPD was appointed to represent him on appeal. Counsel took no part in drafting the Rule 35, no part in filing the Rule 35, and while both Mark and counsel argued portions of the Rule 35 at the February 12, 2009, hearing, Mark handled most of the arguments. (2/12/09 Hrg. Tr., p.15, L.4 – p.18, L.23 (Kovis's Rule 35 argument), p.19, L.2 – p.22, L.3 (Mark's Rule 35 argument), p.30, L.19 – p.32, L.3 (Mark's response to State's Rule 35 argument). The State disregards Mark's reliance on *State v. Lee*, 117 Idaho 203, 204 (Ct. App. 1990), the facts of which are virtually identical to his case, and claims this Court had no idea that the defendant in *Lee* was represented by counsel when it allowed the defendant to rely on the mailbox rule to render his otherwise untimely appeal timely. (Resp't Br., pp.81-82.)

Although Mark maintains *Lee* is controlling, he also notes that trial counsel was not engaged in any activity resembling the practice of law with respect to his Rule 35.

> The practice of law as generally understood, is the doing or performing services in a court of justice, in any matter depending [sic] therein, throughout its various stages, and in conformity with the adopted rules of procedure. *But in a larger sense*, it includes legal advice and counsel, and the *preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending [sic] in a court.*

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walls. The proposed Section 18-2510, Idaho Code, will enhance safety and security in correctional facilities statewide." Statement of Purpose, RS 20850.

> The drafting of the documents alleged to have been prepared by defendant, or the giving of advice and counsel with respect thereto, by one not a licensed attorney at law, would constitute an unlawful practice of law, whether or not a charge was made therefor, and even though the documents or advice are not actually employed in an action or proceeding pending in a court.

Idaho State Bar v. Meservy, 80 Idaho 504, 508-09 (1959) (internal citations and quotations omitted); *see also Citibank (S. Dakota), N.A. v. Carroll*, 148 Idaho 254, 260 (2009); *Idaho State Bar v. Villegas,* 126 Idaho 191, 1931 (1994).

As the Ninth Circuit Court of Appeals has recognized, "When a lawyer prepares legal documents on behalf of a prisoner and arranges for those documents to be signed and filed, the prisoner is not proceeding without assistance of counsel." *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (citations omitted). Here, because trial counsel engaged in no activities that would be considered the practice of law with respect to the preparation, signing and filing of Mark's Rule 35 motion, the mailbox rules applies. Because Mark's Rule 35 motion is timely under the mailbox rule, this Court must remand Mark's case for a decision on the merits of his Rule 35 motion.

CONCLUSION

For the reasons explained herein and in Mark's Appellant's Brief, this Court should vacate Mark's judgment of conviction and sentence, and remand his case for a new trial. Alternatively, this Court should vacate the district court's order denying his Rule 35 motion as untimely, and remand his case for a decision on the merits.

DATED this 6th day of October, 2015.

SHANNON N. ROMERO
Counsel for Mr. Lankford

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, as indicated below:

MARK HENRY LANKFORD INMATE #20489 I.C.I.O. 381 W. HOSPITAL DR OROFINO, ID 83544	___ Statehouse Mail _✓_ U.S. Mail ___ Facsimile ___ Hand Delivery
HON. JAMES F. JUDD DISTRICT JUDGE 851 W. FRONT ST., APT 1202 BOISE, ID 83702	___ Statehouse Mail _✓_ U.S. Mail ___ Facsimile ___ Hand Delivery
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